BEFORE THE DIRECTOR OF THE DEPARTMENT OF PESTICIDE REGULATION
STATE OF CALIFORNIA

In the Matter of the Decision of
Agricultural Commissioner of
the County of Kern
(County File No. 010-ACP-KER-09/10)

Administrative Docket No. 174

DECISION

Crystal Organic Farms, LLC
P.O. Box 81498
Bakersfield, California 93380
Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5, and Title 3, California Code of Regulations (3 CCR) section 6130, county agricultural commissioners may levy a civil penalty up to $5,000 against a person who violates certain California pesticide laws. After notice and a hearing, the Kern County Agricultural Commissioner levied a $1,000 penalty against Crystal Organic Farms for violating 3 CCR section 6766(c) by failing to ensure employees were immediately taken to a physician when there was reasonable grounds to suspect the employees had a pesticide illness or an exposure to a pesticide that might reasonably be expected to lead to an illness.

Crystal Organic Farms (Appellant) appealed the Commissioner's action to the Director of the Department of Pesticide Regulation. The Director has jurisdiction over the appeal under FAC section 12999.5.

Factual Background

On the morning of July 10, 2009, Crystal Organic Farms used fieldworkers employed by Maui Harvesting, a farm labor contractor, to harvest green onions. At the same time, Ha's Farms applied two pesticides to an adjacent apple orchard (FujiMite 5EC, U.S. EPA reg. no. 71711-19, and Assail 70WP, U.S. EPA reg. no.8033-23-82695). Ha's Farms' application drifted on to Crystal Organic Farms' fieldworkers, some of whom complained of odor, eye irritation, and feeling sick. Crystal Organic Farms called 911, and the Kern County Fire Department responded to render emergency medical services.

Appellant's Contentions

On appeal, Crystal Organic Farms contends that: (1) the CAC failed to submit any court admissible evidence in support of its case; (2) 3 CCR section 6766(c) only applies to employees that enter treated fields; (3) section 6766(c) does not apply to employees of its labor contractor; and (4) the CAC did not prove its case by a preponderance of the evidence.

Standard of Review

The Director decides matters of law using her independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Director decides the appeal on the record before the Hearing Officer. In reviewing the commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or

uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the commissioner's decision. The Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision. The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the commissioner's decision.

The Hearing Officer's Proposed Decision

Over objection by Appellant, the Hearing Officer admitted into evidence the written statements contained in County Exhibit 4 (Pesticide Episode Investigation Report) attributed to 33 of the 34 Maui Harvesting employees, and three Ha's Farms representatives to "support findings based on non-hearsay evidence or evidence admissible under an exception to the hearsay rules," even though he had found all the statements to be hearsay. The statements of Miguel Perez were rejected as inconsistent. The Hearing Officer also admitted into evidence the written statements of Respondent's employees Jorge Meza and Ysidro Garcia-Martinez also found in County Exhibit 4, under an exception to the hearsay rule. The Hearing Officer did not state what hearsay exceptions he relied upon.

The Hearing Officer found that, although the Maui workers were not working in a treated field as defined in 3 CCR section 6700, under 3 CCR section 6760(a) employers are subject to the requirements in Article 3, "Field Worker Safety," if employees *may* enter treated fields. The Hearing Officer then found that the workers' supervisor was aware of a pesticide application nearby that may be causing an odor and eye irritation to the workers, and instead of taking all reasonable measures to make sure the workers received immediate medical attention from a pesticide exposure, such as quickly identifying the chemicals to which the workers were being exposed, and the potential illness symptoms, the supervisor allowed the workers to continue working and delayed initiating a medical response for at least 1 1/2 hours. Based on this finding, the Hearing Officer found that Appellant violated 3 CCR section 6766(c) by failing to ensure that the employees received immediate medical attention when exposure to a pesticide had occurred that might reasonably be expected to lead to an employee's illness. The Hearing Officer found that the violation was properly placed in Class B because it created a reasonable possibility of health effect, and set the fine at the top of the Class B range because of the number of employees involved.

Director's Findings and Analysis

(1) The CAC submitted sufficient admissible evidence to support its case.

The first ground of Appellant's appeal is that the CAC failed to submit any evidence admissible in court to support its case. At hearing, and in its appeal brief, Appellant objected to the admission of all of the written statements of witnesses collected by the CAC inspector, Irene M. Acosta, Agricultural Biologist III, and summarized in her report County Exhibit 4, the Pesticide Episode Investigation Report, as hearsay. Appellant argues that since there was no exception to the hearsay rule that would have made the statements admissible in court, this evidence cannot be used to support the CAC's case.

The hearings conducted by the CAC for pesticide use violations are mandated under FAC section 12999.5, and require that the person charged with the violation be given a written notice of the proposed action, have the right to request a hearing, have an opportunity to review the CAC's evidence, and be allowed to present evidence on his or her own behalf. The hearings are informal and are designed to allow non-lawyers to defend themselves without needing to hire an attorney or possess legal knowledge or experience. The technical rules of evidence are not applied in these hearings. Appellant has not objected to the nature of the proceeding nor has the Appellant suggested it did not receive due process. The Appellant in fact appeared and was represented by counsel who had the opportunity to cross-examine Ms. Acosta and other witnesses. Counsel presented witnesses and documentary evidence. Counsel also had the opportunity to call as witnesses the people who had given the written statements but declined to do so. Counsel could have called the hearsay declarants to the stand to contradict the statements they gave to the investigator. The reading of the investigation report into the record by Ms. Acosta objected to by Appellant's counsel as hearsay was nothing more than an inartful presentation of evidence. The CAC's advocate is not an attorney, and the hearings are designed to avoid the need for either side to hire an attorney to represent them in these informal hearings.

Hearsay evidence is admissible to support findings in administrative hearings under provisions of the Administrative Procedures Act (APA), Government Code section 11513(d). However, local agencies such as the CAC are not subject to the APA, but can voluntarily utilize some of its general provisions. Government Code section 11410.40. The Hearing Officer in this case explained that "Hearsay can't be the only thing upon which a finding is based. There has to be some tangible, i.e. court admissible evidence that the hearsay evidence supports or explains." Appellant objects to the admission of the written witness statements as hearsay but does not address the use of the statements as corroborative of the non-hearsay evidence of laboratory reports that established that five of the workers were found to have pesticide residue on their pants and were thus exposed to pesticides. It is uncontroverted that a pesticide application occurred on the adjacent apple orchard and that workers were exposed. The Pesticide Use Report (County Exhibit 9) and the Fire Department Incident Report (County Exhibit 20) are not hearsay, and established when the exposure occurred relative to the time when the Appellant called 911 to seek medical care. The timeline established is supported by the written summaries

contained in County Exhibit 4. Therefore, even if the summary statements were inadmissible hearsay in a court of law, they are properly admissible in this informal administrative hearing and can be used to support other non-hearsay evidence. And, as the Hearing Officer pointed out, some of the statements were admissible under hearsay exceptions.

Moreover, the Pesticide Episode Investigation Report (County Exhibit 4), and the written statements contained in the report is admissible under a specific hearsay exception. The CAC, in coordination with the Director, enforces the pesticide use laws and associated regulations (see FAC section 11501.5). As part of this enforcement, the CAC investigates pesticide worker exposure incidents and prepares a report of the findings. The Pesticide Episode Investigation Report is a record prepared by a public employee (Ms. Acosta) within the scope of her duty, made at or near the time of the incident, and the sources of information and method and time of preparation are such as to indicate its trustworthiness. The report is admissible by the exception to the hearsay rule found in Evidence Code section 1280. This is so even if the report contains hearsay statements. See *Lake v. Reed* (1997), 16 Cal.4th 448, 461.

The assertion that the CAC failed to submit admissible court evidence or sufficient evidence to support its case is rejected.

(2) Article 3, section 6766(c) applies to farm workers exposed to pesticides while working in an adjacent field.

Section 6766(c) provides:

> When there are reasonable grounds to suspect that an employee has a pesticide illness, or when an exposure to a pesticide has occurred that might reasonably be expected to lead to an employee's illness, the employer shall ensure that the employee is taken to a physician immediately.

Crystal Organic Farms argues that everything in Article 3 only applies to workers in treated fields because the first subsection of section 6760, subsection (a), provides: "Employers shall comply with the requirements of this article to protect employees who may enter treated fields."[1] Read in isolation, this section may suggest that Article 3 as a whole, and thus section 6766(c), is meant to apply to workers who enter treated fields only.[2]

A review of these subsections in the broader context of the Subchapter 3, Pesticide Worker Safety, is instructive. Article 3 is one of five articles found in Subchapter 3. The chapter under which the subchapter is placed is Chapter 3, Pest Control Operations. The authorizing statute for pesticides and worker safety, FAC section 12980, states the legislative intent to "provide for the safe use of pesticides and for safe working conditions for farm workers,

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[1] The subsection at issue is found within 3 CCR, Division 6, Chapter 3, Subchapter 3, Article 3, titled "Field Worker Safety."

[2] The phrase "treated field" is defined in 3 CCR section 6000 as a field that has been treated with a pesticide or had a restricted entry interval in effect within the last 30 days. It includes roads and other areas, but does not include areas inadvertently contaminated by drift or overspray.

pest control applicators, and other persons handling, storing, or applying pesticides, *or working in and about pesticide-treated areas*" (emphasis added).

Under Article 1 of Subchapter 3, General Scope and Purpose, section 6700(b) states (as relevant here) "This group specifies work practices for: . . . employees who are exposed to residues of pesticides after application to fields." The section goes on to say that the "requirements of this group do not allow a lower standard of protection when pesticide labeling statements require a higher standard of protection," and that "[i]n general, the work practices and safety requirements stated in this group are designed to reduce risk of exposure and to ensure availability of medical services for employees who handle pesticides, and to provide safe working conditions for field and other workers." Thus, the stated purpose of the regulations is to protect workers and provide medical care where needed. The remaining regulations must be read with that purpose in mind and not in isolation. Moreover, section 6701 requires that the requirements of the subchapter should be interpreted at least as strict as, and consistent with, the Worker Protection Standards (WPS) in Title 40 Code of Federal Regulations, Part 170 (addressed in more detail below). Although many of Article 3's provisions do prescribe precautions employers must take in advance for farmworkers who work in treated fields, in the context of the authorizing statute, the regulations as a whole, and their purposes, sections 6760 and 6700 are best read as a general description, not a strict limitation; and section 6766(c) certainly encompasses farmworkers drifted upon by pesticides from the treatment of an adjacent field.

Sections within Article 3 intended to apply only to workers in treated fields contain specific limiting language. Section 6761(a) requires the property operator to display application-specific information "while fieldworkers are employed to work in treated fields." Section 6764 requires the employer to assure that employee assigned to work in a treated field has been trained "before beginning work in the treated field." Section 6766(a) requires the employer to plan in advance for emergency care for workers "who enter fields that have been treated with pesticides" including locating a facility where emergency care is available for employees "who will be working in treated fields." Section 6768 requires the employer to make water, soap, and towels accessible to all fieldworkers "engaged in activities involving contact with treated surfaces in treated fields." Section 6770 generally prohibits directing employees into "a field on the date of the scheduled application." This is hardly consistent with the theory that sections 6760 or 6700 were meant to limit the applicability of Article 3.

In contrast, there is no reference in section 6766(c) to treated fields. If the language of section 6766(c) was meant to be limited in a similar way, one would expect the Department would have explicitly defined that limit, as it did in each of the preceding sections.[3] But it did not, and the disparate inclusion and exclusion of the limiting phrases related to treated fields within Article 3 is not accidental.

[3] For example, by including language such as "who entered a treated field," or "who was exposed in a treated field."

In addition, to limit section 6766 to workers in a treated field is in conflict with the interpretive principle of section 6701. Whenever the context will allow, DPR's worker safety regulations, of which section 6766(c) is a part, should be interpreted to be "at least as strict as, and consistent with," the WPS promulgated under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). (3 CCR section 6701.) DPR's worker safety regulations may go further and apply more broadly, but they must at least provide all of the protections of the federal standards because DPR's worker safety regulations are enforced by state and local authorities in lieu of the WPS. (*Id.*) In other words, DPR's worker safety regulations may not have any gaps in coverage when compared to the federal standards.

The WPS require an agricultural employer to provide transportation to an emergency medical facility if there is reason to believe an employee has been poisoned or injured by exposure to pesticides that the employer used, specifically including exposure from "drift." (40 CFR section 170.160(a).) Section 170.160 is not limited to workers who enter treated fields. Thus, to read section 6766(c) as limited to workers in treated fields would create the kind of gap in coverage that section 6701 is meant to avoid. Under Crystal Organic Farms' interpretation, section 6766(c) would not apply if drift from its own application sickened its own fieldworkers, so long as they were in an untreated field at the time. This result would be inconsistent with the WPS. Section 6766(c) cannot be read to create such an absurd result.

Crystal Organic Farms argues that it would be "inconsistent" to apply section 6766(c) more broadly than section 6766(a) because they are in the same section. This is simply a *non sequitor*. The two requirements are in the same section, titled "Emergency Medical Care," because they both address that subject. Neither is it logically inconsistent for subsection (c) to apply more broadly than (a). Subsection (a) addresses what an employer must do when it puts employees into a situation where it knows, *in advance*, of a specific risk of exposure to a pesticide (i.e. a treated field); it must plan, *in advance*, for provision of emergency medical care. Subsection (c) addresses how an employer must react if it should suspect an employee *was* exposed to a pesticide and *is*, or will be, sick; it must ensure that he or she is immediately taken to a physician. Thus it makes perfect sense that subsection (c) applies more broadly than (a). What would not make sense would be a rule that Crystal Organic Farms does not need to provide for emergency care for its sick workers that did not get sick in the way it had anticipated.

Restricting the application of section 6766(c) to farmworkers exposed in treated field conflicts with a fundamental purpose of the worker safety regulations: to provide "for safe working conditions for farm workers . . ." (FAC section 12980. See also 3 CCR section 6700, last paragraph.) The apparent purpose of section 6766 is to ensure that farmworkers in California who have a pesticide illness receive prompt emergency medical care. Why distinguish between a farmworker that became ill through entering a treated field and one who became ill due to pesticide drift from an adjacent field? If anything, the worker who was drifted upon is more likely to need immediate medical attention. Crystal Organic Farms' reading is untenable because it would fundamentally undermine the purpose of section 6766 and of the authorizing statute by

removing the protections of subsection (c) from field workers exposed to pesticides through drift, for no countervailing benefit.

Crystal Organic Farms does offer two arguments to support its interpretation, but on closer examination both are unconvincing. First, it contends that subsection (c) should not apply to farm workers exposed to drift from an adjacent field to avoid overbroad application of the requirement. It argues that if the term "employee" is not read as limited, then subsection (c) could be applied to any employee involved in any industry or activity who was exposed to pesticides, which is "simply too broad." Of course the fallacy of that argument is the presumption that if subsection (c) is not limited in the way that Crystal Organic Farms would like, then it must not have a reasonable limit. DPR's jurisdiction can only extend to its statutory mandate:

> . . . to provide for the safe use of pesticides and for safe working conditions for farm workers, pest control applicators, and other persons handling, storing, or applying pesticides, or working in and about pesticide-treated areas. (FAC section 12980.)

There is no question of overbroad application in this case. It involves farmworkers harvesting a crop adjacent to a field that was in the process of being treated with pesticides at the time--exactly the persons for whose benefit DPR is explicitly directed to regulate.

Second, Crystal Organic Farms suggests that it is not fair to apply section 6766(c) to farmworkers exposed to drift from an adjacent field because it was "unfortunate happenstance" that an application took place and resulted in drift. Presumably the argument is that Crystal Organic Farms did not have the same notice of a potential pesticide exposure as if it had sent its workers into a treated field. Section 6766(c)'s requirement to ensure an employee is immediately taken to a physician only begins "[w]hen there are reasonable grounds to suspect that an employee has a pesticide illness . . ." An employer that plans to send workers into a treated field may suspect a pesticide illness sooner than an employer who did not know in advance that its employees would be working near a pesticide application. However, once each employer has reasonable grounds to suspect a worker has a pesticide illness, there is no principled reason to require one to react immediately, but not the other. Regardless, in this case it appears Crystal Organic Farms did have advanced notice of a potential risk of exposure. According to his statement recorded in the County's investigation report, the onsite supervisor saw that the adjacent field was being treated and noted a chemical odor earlier in the day.

(3) Section 6766(c) applies to employees of Appellant's farm labor contractor.

Again, Appellant encourages a very strict reading of the regulations to preclude the employees of a labor contractor from the protections of section 6766(c). For all the reasons listed in section (2) above, it would be contrary to the legislative intent of the authorizing statute (FAC section 12980), and the intent stated in regulation, to find that the employees of a farm labor contractor do not have the same protections as employed fieldworkers [see 3 CCR sections 6700(b) ("[i]n general, the work practices and safety requirements stated in this group are designed to reduce risk of exposure and to ensure availability of medical services for

employees who handle pesticides, and to provide safe working conditions for field and other workers) and 6701. See also 40 CFR section 170.160(a)].

The concept of dual responsibility for employees is well established in workplace health and safety law and in workers compensation law. The key factor to responsibility is direction and control. The definition of an employer found in 3 CCR section 6000 is any person who exercises primary direction and control over the work, services, or activities of an employee. Appellant stipulated that Jorge Meza was its employee and that he directed the work of the crew harvesting onions that are the subject of this action. Appellant argues that because the language of sections 6761(b) and 6447.2(g), which both require the operator of property to provide certain information to employees, contains the phrase "including the employees of labor contractors," all other regulations that do not include this phrase must be read to exclude employees of labor contractors. This argument is not logical and is rejected. These two regulations simply make it clear that the operator of property take further steps to provide information to those employees present beyond those employed by the operator.

To reiterate: section 6700(b) states "[i]n general, the work practices and safety requirements stated in this group are designed to reduce risk of exposure and to ensure availability of medical services for employees who handle pesticides, and to provide safe working conditions for field *and other workers* (emphasis added). FAC section 12980 states legislative intent to "provide for the safe use of pesticides and for safe working conditions for farm workers, pest control applicators, and other persons handling, storing, or applying pesticides, *or working in and about pesticide-treated areas*" (emphasis added).

3 CCR section 6766(c) must be interpreted to apply to the employees of farm labor contractors.

(4) The CAC proved its case by substantial evidence.

Appellant asserts that the CAC did not prove its case by a preponderance of the evidence. That is not the proper standard under which the Director decides this appeal. FAC section 12999.5(c)(5) requires the Director to affirm the CAC's decision where it is supported by substantial evidence.

There is substantial evidence in the record to support a conclusion that: Crystal Organic Farms had reasonable grounds to suspect its employees were sick, and/or could reasonably be expected to get sick, from pesticide exposure; and that once such grounds arose, Crystal Organic Farms failed to ensure its employees were taken to a physician immediately.

Incompetent hearsay evidence alone is not substantial evidence, (*Borror v. Department of Investment*, 92 Cal.Rptr. 525, 533 [Cal.App. 1971], *Layton v. Merit System Commission*, 131 Cal.Rptr. 318, 324 - 325 [Cal.App. 1976]). However, Exhibit 4, the County's investigation report, and Exhibit 20, the fire department's report, both established, as "official records" that would be admissible in civil court (Evid. Code, section 1280), that Crystal Organic Farms had reasonable grounds to suspect employees were sick or could reasonably be expected to be sick from pesticide exposure.

The Hearing Officer found that the written statement of the crew supervisor Jorge Mesa was competent evidence admissible under a hearsay exception. Insofar as his statement relates to specific facts and the acts in which Mr. Mesa himself was involved, his statements recorded in the inspection report would be admissible in civil court as vicarious admissions (Evid. Code section 1224, *Labis v. Stopper* [App. 1 Dist. 1970] 89 Cal.Rptr. 926), as well as being admissible under Evidence Code section 1280. Mr. Mesa's statements, corroborated by the Kern County Fire Department Incident Report, County Exhibit 20, establish the time between knowledge of possible exposure and the provision of medical care as being 1 ½ hours. The conclusion drawn by the Hearing Officer that the Appellant failed to ensure the immediate medical care required by section 6766 was reasonable and well supported by the record.

Apart from the technical rules of evidence, a reasonable person could find Mr. Mesa's statements recorded by county inspectors to be reliable because of Crystal Organic Farm's behavior during the hearing. Crystal Organic Farms knew before the hearing that the County would offer Mr. Mesa's statements. Crystal Organic Farms brought the vice president of corporate and government affairs for Grimmway Farms, its regulatory compliance officer, and its safety director to the hearing. These men had little first hand knowledge and no important testimony to give, and, for the most part, offered irrelevant evidence as to the company's "character," something the County had never put in question. However, Crystal Organic Farms failed to bring Mr. Mesa, the single most important witness in the case to explain the statements attributed to him in the inspector's report and testify as to what happened. Instead it offered a self-serving hearsay statement prepared for the hearing long after the events in question.

Mr. Mesa's vicarious admissions, the Kern County Fire Department Incident Report, and the County's investigation report provide substantial evidence to support the Commissioner's decision.

The Fine Category and Level Were Appropriate

Once the Appellant had reasonable notice of the illness or exposure to the workers, the Appellant failed to ensure immediate medical care. This failure created a reasonable likelihood of a health hazard which supports a fine in the Class B category. The statements of the workers and the Fire Department's report establishes that the workers were exposed to a pesticide, and in fact felt eye irritation and illness as a result of pesticide exposure. The record actually supports a Class A violation that an actual health hazard was created. However, because the CAC sought only a Class B violation in its Notice of Proposed Action, the fine is limited to the Class B, and is found by the Director to be appropriate. Setting the fine at $1,000 at the high end of the class B range is soundly within the discretion of the CAC and is supported by the evidence.

Conclusion

For the foregoing reasons, the Commissioner's decision to levy a penalty of $1,000 against Crystal Organic Farms for violating 3 CCR section 6766(c) is supported by substantial evidence.

Disposition

The Commissioner's decision and order is affirmed. The $1,000 fine levied by the Commissioner is due within 14 days of the date of this decision.

STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION

Dated: 11.01.10

By: _____
Mary-Ann Warmerdam, Director